

JAN 14 3 29 PM '00

DISPATCHED
Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Amendment of Section 73.202(b),
Table of Allotments,
FM Broadcast Stations.
(Beaumont and Dayton, Texas)

)
)
)
) MM Docket No. 00-9
) RM-9526
)
)

NOTICE OF PROPOSED RULE MAKING**Adopted: January 12, 2000****Released: January 14, 2000****Comment Date: March 6, 2000****Reply Date: March 21, 2000**

By the Chief, Allocations Branch

1. Before the Commission for consideration is a Petition for Rule Making filed on behalf of KXTJ License, Inc. ("KXTJ"), proposing the reallocation of Channel 300C from Beaumont Texas to Dayton, Texas. KXTJ also requests modification of its license for Station KXTJ(FM), Beaumont, to be modified to specify operation at Dayton. KXTJ stated its intention to apply for Channel 300C if it is reallocated to Dayton.

2. KXTJ filed its request pursuant to Section 1.420(i) of the Commission's Rules which permits the modification of a station's authorization to specify a new community of license without affording other interested parties an opportunity to file competing expressions of interest. See Modification of FM and TV Authorizations to Specify a New Community of License ("Change of Community R&O") 4 FCC Rcd 4870 (1989), recon. granted in part ("Change of Community MO&O"), 5 FCC Rcd 7094 (1990). In support of its proposal, KXTJ states that the requested reallocation of Channel 300C to Dayton is mutually exclusive with the current allotment of Channel 300C at Beaumont and that the channel should be reallocated without the acceptance of competing expressions of interest in the Dayton allotment. KXTJ contends that its proposal is in the public interest as Dayton will be provided with its first local service and that there is no issue of service loss or gain created by this proposal as relocation is not a factor. KXTJ recognizes that it operates as a short-spaced station under Section 73.215 of the Commission's Rules with respect to Station KTBQ, Nacodoches, Texas and Station KRXZ, Erath, Louisiana, and that the spacing will not change if its proposal is adopted since no site change is contemplated. KXTJ argues that the policy adopted in Newnan and Peachtree City, Georgia, 7 FCC Rcd 6307 (1992), should apply in this case since no site change is proposed and therefore, the potential for interference would not be increased. In the alternative, KXTJ requests a waiver of Section 73.207 of the Commission's Rules to permit a new, short-spaced station at Dayton pointing out that since no

new interference will be created and the current interference will not be increased, the integrity of the FM Table of Allotments will be preserved.

3. KXTJ states that its proposal meets the prerequisites for change of community of license proposals, as Beaumont will not be deprived of its only local service and a preferential arrangement of allotments will result with a first local service for Dayton. First of all, KXTJ demonstrates that Beaumont will retain ten local transmission services if Channel 300C is reallocated to Dayton as a first local service.¹ Therefore, grant of this proposal will not deprive Beaumont of its sole local service. Second, KXTJ points out that the FCC's FM allotment priorities are: 1) first aural service; 2) second aural service; 3) first local service; and 4) other public interest matters. KXTJ argues that its proposal for Dayton should be considered under priority number 3, first local service, while retention of Channel 300C at Beaumont should be considered under priority number 4, other public interest matters. Therefore, since priority 3 is higher than priority 4, KXTJ believes its reallocation proposal should be favored. In other matters, KXTJ recognizes the Commission's concerns with the potential migration of stations from rural areas to well-served urban areas but in this instance, the reallocation is from an urban location, Beaumont, to the city of Dayton, which is not located in an Urbanized Area. Continuing, KXTJ explains that since no transmitter site change is proposed, Station KXTJ(FM) will continue to cover more than 50% of the Beaumont Urbanized Area as well as the Port Arthur Urbanized Area with the station's 70 dBu contour. Here, KXTJ refers to Headland, Alabama, and Chattahoochee, Florida, 10 FCC Rcd 10342 (1995) and Faye and Richard Tuck, 3 FCC Rcd 5374 (1988).² KXTJ believes that Commission policy and public interest favor providing a first local service to Dayton as compared to retaining 11 local services in Beaumont.

4. On December 2, 1999, KXTJ filed a supplement to its petition proposing an alternate reference site for Channel 300C at Dayton.³ KXTJ points out that at its current licensed site it is short-spaced, pursuant to Section 73.215 of the Rules, to Station KTBQ, Nacogdoches and Station KRXZ, Erath,

¹ The following stations are licensed to Beaumont, Texas:

² KXTJ provided the following information supporting Dayton's status as an independent community. Dayton is not contiguous to Beaumont or Port Arthur and is in fact located 76 kilometers from Beaumont and approximately 94 kilometers from Port Arthur. Dayton has its own local government with an elected mayor, city manager and city council. The council oversees Dayton's departments for water and sewer systems, sanitation systems, and street construction. Dayton has its own post office and zip code (77535), local telephone directory which is shared with the neighboring city of Liberty, Texas, a local newspaper, The Liberty Vindicator, which is published three times a week. Dayton also has a local bus service provided by Kerrville Bus Lines, as well as its own police and fire departments, and local library. The Dayton Independent School District operates two elementary schools, one junior high and one high school. Dayton has numerous medical facilities, banks, and commercial businesses, as well as recreational facilities, churches, civic organizations and seasonal activities.

³ In accordance with Commission policy, if a proponent intends to relocate its authorized facility from a rural Community to a suburban community that is adjacent to an urbanized area, and from which its intended operation would place a city grade (70 dBu) signal over 50% or more of the urbanized area, the petitioner is required to demonstrate that the intended city of license is sufficiently independent of the central city to justify a first local service preference. See Headland, Alabama and Chattahoochee, Florida, 10 FCC Rcd 10352 (1995). KXTJ has provided a showing that Dayton is an independent community in its petition for rule making requesting the reallocation of Channel 300C from Beaumont to Dayton. See Footnote Number 2.

Louisiana. KXTJ states that from the alternate site the short-spacing to Station KTBQ, Nacogdoches is eliminated and the short spacing is decreased by 0.2 miles to Station KRXZ, Erath which operates under Section 73.215 of the Rules.⁴ Further, the short spacing to Channel 300C at Beaumont was created by the licensee of Station KRXZ, Erath. As background, KXTJ states that it operated as a fully spaced station on Channel 300C in 1967, and in 1990, obtained Commission authority to move its transmitter site under Section 73.215 of the Rules to its current site which is short spaced by 2.3 miles to Station KTBQ, Nacogdoches. Subsequently, Station KRXZ(FM), Erath obtained Commission authority to relocate Station KRXZ(FM) in compliance with Section 73.215 of the Rules to a site that is short spaced by 2.8 miles to Station KXTJ(FM). KXTJ argues that its proposal is similar to situations where stations that are now short spaced but were fully spaced prior to the introduction of the Commission's spacing rules in 1965 (so-called "grandfathered" stations) have been reallocated to new communities where the licensees have proposed no site change and the result is a short spaced allotment as in Newnan and Peachtree City, Georgia. KXTJ further states that the Commission has recently reaffirmed this policy in Berlin and North Conway, New Hampshire and Oceanside and Encinitas, California, and has extended this policy to pre-1989 "grandfathered" stations in Fremont and Holton, Michigan. KXTJ contends that Station KXTJ(FM) at the alternate site should not be precluded from providing a first local service to Dayton because the station has been boxed in by another station that created a short spacing when taking advantage of the Commission's relaxation of the spacing rules.

5. In Newnan and Peachtree City, Georgia, 7 FCC Rcd 6307 (1992), the Commission reallocated Channel 244A from Newnan to Peachtree City and modified the license of Station WJKJ to specify Peachtree City as the new community of license. Station WJKJ was a "grandfathered" station (pre-1964, before the new spacing requirements) that did not meet the current spacing requirements set forth in Section 73.207 of the Rules. The proposal in Newnan and Peachtree City, supra, did not involve any change in the technical facilities of Station WJKJ. In taking this action, we recognized that we were creating a new short-spaced allotment in contravention of Section 73.207 of the Rules. Our rationale for this action was that "grandfathered" FM stations were in compliance with our Rules when authorized and should be afforded the same opportunity to change their community of license as other stations authorized in conformity with our rules. In Oceanside and Encinitas, California, released

⁴ KXTJ provided a gain and loss study for Channel 300C at Dayton. According to KXTJ the estimated population and land area within the present KXTJ predicted 1 mV/m contour are 2,138,396 people and 20,610 square kilometers. The estimated population and land area within the 1 mV/m circle for the assumed Dayton allotment, assuming minimum facilities, would be 859,986 people and 13,830 square kilometers. On this basis, the proposed allotment change would result in a loss of 1 mV/m coverage to 1,278,410 people within 6,780 square kilometers. KXTJ believes there is a disparity due to the difference in transmitting facilities between the two allotments; the nearly maximum Class C facilities at Beaumont and the assumed minimum Class C facilities for the Dayton allotment. KXTJ believes a more realistic method would be to compare equivalent Class C allotments at both locations (100 kw and 300 m). The estimated population and land area within the 1 mV/m circle for the assumed channel 300C allotment at the present KXTJ site are 794,289 people and 14,190 square kilometers. As noted above, the estimated population and land area for the assumed Dayton allotment are 859,986 people and 13,770 square kilometers. On this comparative basis, the proposed Dayton Channel 300C allotment would provide 1 mV/m coverage to 65,697 more people within 420 fewer square kilometers.

September 10, 1999, the Commission adopted a Report and Order which granted a change of community of license to a short-spaced pre-1964 grandfathered station at its existing site. On October 8, 1999, the Commission released a Report and Order in Fremont and Holton, Michigan, which permitted a pre-1989 station to change its community of license without changing sites, continuing to operate as a short-spaced station. In both cases, no site change took place which resulted in no new or additional short spacing. Once a staff engineering analysis determined that the proposed channel could be allotted to the new community, we then determined whether the reallocation would result in a preferential arrangement of allotments as set forth in Revision of FM Assignment Policies and Procedures ("FM Priorities"), 90 FCC 2d 88 (1982). Using those priorities, we determined that the change of community of license resulted in a preferential arrangement of allotments.

6. In Killeen and Cedar Park, Texas, 14 FCC Rcd 7472 (1999), the Commission issued a Notice of Proposed Rule Making in response to a petition filed by LBJS Broadcasting Company, LP ("LBJS"), requesting the reallocation of Channel 227C from Killeen, Texas to Cedar Park, Texas, with modification of its license for Station KAJZ to specify Cedar Park as the new community of license. Unlike Station KXTJ(FM), Beaumont, Station KAJZ, Killeen, is a pre-1964 grandfathered short-spaced station that is short spaced to Station KLBJ, Austin, Texas, which is also a pre-1964 grandfathered station. Station KAJZ at Killeen or Cedar Park is also short-spaced to stations at Dublin, Port Lavaca and Haltom City, all of which operate under Section 73.215 of the rules with respect to Station KAJZ. The stations at Dublin, Port Lavaca and Haltom City each have a site that is protected in the Commission's data base that is fully spaced to Station KAJZ at Killeen as well as Cedar Park. In the current proceeding, with the alternate site proposed by KXTJ, Station KXTJ(FM) could operate as a fully spaced facility except with respect to Station KRXX, Erath, Louisiana. This short spacing was created when the Commission granted the Erath station authority to operate under Section 73.215 with respect to Station KXTJ, Beaumont. Thus there is a similarity between the proposals for Killeen and Cedar Park and Beaumont and Dayton as both stations could operate at their new community of license as fully-spaced stations with the exception of the stations that have been authorized by the Commission to operate under Section 73.215 in the direction of Killeen and Beaumont. We seek comment on this analysis and on whether Newnan and Peachtree City policy should be extended to the facts of this case.

7. Channel 300C can be allotted to Dayton, Texas, at KXTJ's proposed site 35.3 kilometers (22 miles) east of the community.⁵ At this site, Station KXTJ(FM) will remain short-spaced to Station KRXX, Channel 300C1, Erath, Louisiana, at its licensed site which is authorized under Section 73.215 of the rules. Channel 300C is, however, fully spaced to the allotment site for Channel 300C1 at Erath. In accordance with Section 1.420(I) of the Commission's Rules, we shall not accept competing expressions of interest in the use of Channel 300C at Dayton, Texas.

8. In view of the fact that the proposed allotment could provide a first local service to Dayton without depriving Beaumont of its sole local service, the Commission believes it would serve the public

⁵ The coordinates for Channel 300C at Dayton are 30-00-56 and 94-31-37.

interest to solicit comments on the proposal to allot Channel 300C to Dayton, Texas. Therefore, we will seek comments on the proposed amendment to the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to Beaumont and Dayton, Texas, as follows:

Channel No.		
Community	Present	Proposed
Beaumont, Texas	231C1, 236C1, 248C1 273C2, 300C	231C1, 236C1, 248C1, 273C2
Dayton, Texas	-----	300C

9. IT IS ORDERED, That the Commission's Office of Public Affairs, Reference Division, shall send by Certified Mail, Return Receipt Requested, a copy of this Order to the following:

Capstar Royalty Corporation
Station KTBQ
600 Congress Avenue
Suite 1400
Austin, TX 78701

Comcorp of Lafayette Corp.
Station KRXZ
P. O. Box 53708
Lafayette, LA 70505

10. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

11. Interested parties may file comments on or before March 6, 2000 and reply comments on or before March 21, 2000, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, 445 Twelfth Street, S.W., Washington, D. C. 20554. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Lawrence Roberts
Mary L. Plantamura
Davis Wright Tremaine LLP
1155 Connecticut Avenue, N.W., Suite 700
Washington, D. C. 20036

12. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and

73.606(b) of the Commission's Rules, 46 FR 11549, February 9, 1981.

13. For further information concerning this proceeding contact Kathleen Scheuerle, Mass Media Bureau, (202) 418-2180. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no ex parte presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An ex parte presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an ex parte presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an ex parte presentation and shall not be considered in this proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204.(b) and 0.283 of the

Commission's Rules, **IT IS PROPOSED TO AMEND** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the Notice of Proposed Rule Making to which this Appendix is attached.

2. Showings Required. Comments are invited on the proposal(s) discussed in the Notice of Proposed Rule Making to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. Cut-off Procedures. The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules).

(b) With respect to petitions for rule making which conflict with the proposal(s) in this Notice, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. Comments and Reply Comments; Service. Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the Notice of Proposed Rule Making to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties, must be made in written comments reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. such comments and reply comments shall be accompanied by a certificate of service. (See Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, 445 Twelfth Street, S.W., TW-A325,

Washington, D. C. 20554.

5. Number of Copies. In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs,

or other documents shall be furnished the Commission.

6. Public Inspection of Filings. All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 445 Twelfth Street, S.W., Washington, D. C.